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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 291

WILLIAM R. BERTELSEN,
Petitioner,

vs.

BRIGADIER GENERAL JAMES B. COONEY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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No. .....

WILLIAM R. BERTELSEN,

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BRIGADIER GENERAL JAMES B. COONEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled cause on May 20, 1954.

OPINION BELOW.

The opinion of the Court of Appeals is reported in 213 Fed. 2d 275. It appears in the Appendix to this Petition.

JURISDICTION.

The judgment of the Court of Appeals was entered on May 20, 1954 (Rec. 48). The jurisdiction of this court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED.

Whether Public Law 779, 81st Congress, commonly known as the Doctor Draft Act, Sub-section 4, (i) of the Universal Military Training and Service Act, 64 Stat. 826, 50 Appx. U. S. C. 454(i), re-enacted June 19, 1951, 65 Stat. 75 at 88, is constitutional.

STATUTES INVOLVED.

Public Law 779, 81st Congress, commonly known as the Doctor Draft Act, Sub-section 4, (i) of the Universal Military Training and Service Act, 64 Stat. 826, 50 Appx. U. S. C. 454(i), re-enacted 65 Stat. 75 at 88. The text of this statute appears in the Appendix to this Petition. The constitutional provisions involved are the following:

Article I—Section 8.

"The Congress shall have Power To * * * provide for the common Defence * * * To raise and support Armies; * * * to provide and maintain a Navy: * * * To make all Laws which shall be necessary or proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

Article I—Section 9.

"No Bill of Attainder or ex post facto Law shall be passed."

Fifth Amendment.

"No person shall be * * * deprived of life, liberty, or property, without due process of law * * *."

Thirteenth Amendment.

"Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

STATEMENT.

Dr. William R. Bertelsen was drafted into the United States Army as a private on May 28, 1953 at Fort Sheridan, Illinois (Rec. 30). Dr. Bertelsen was licensed to practice medicine in the State of Illinois on August 16, 1948 (Rec. 30). He engaged in the practice of medicine at Neponset, Illinois from that date until his induction (Rec. 30). But for Public Law 779, he was not subject to registration, induction, or service as a draftee. Dr. Bertelsen at the time of his induction was thirty-three years of age (Rec. 29). No person other than a doctor or special registrant was subject to being drafted after he attained the age of twenty-six (except certain persons who had been deferred for training) (62 Stat. 604; 50 Appx. U. S. C. 454; 32 C. F. R. 1622.50). Under Public Law 779, doctors may be inducted up to their fifty-first birthday (64 Stat. 826; 50 Appx. U. S. C. 454 (i) (a), (b); 32 C. F. R. 1650.11 (b)). In addition, at the time of his induction, Dr. Bertelsen was married, had two children and was expecting a third (Rec. 30). Under the regulations that existed at the time of Dr. Bertelsen's induction, no fathers were being drafted (32 C. F. R. 1622.30 (a) and (c) (1) and (2)). Doctors with children were inducted unless they were able to show "extreme hardship and privation" (32 C. F. R. 1650.11(j)). Dr. Bertelsen was a veteran. During World War II he had been classified 4-F as physically unfit for service, but he voluntarily underwent a hernia operation, became physically fit for service and was inducted and served in the Navy subject to assignment and service as any other inductee (Rec. 10-11). As the law and regulations existed

at the time of Dr. Bertelsen's induction, veterans who had served honorably on active duty for more than ninety days between September 7, 1941 and September 2, 1945 were deferred (32 C. F. R. 1622.40 (i)), but not if they were doctors or other special registrants (32 C. F. R. 1650.11 (k)).

Dr. Bertelsen filed a petition for writ of habeas corpus in the United States District Court for the Western District of Texas seeking his release from the Army on the ground that Public Law 779 was unconstitutional. The petition for writ of habeas corpus was denied by order of the Honorable Judge Thomson, U. S. District Judge, on July 21, 1953. Appeal was taken to the United States Court of Appeals for the Fifth Circuit and on May 20, 1954, the United States Court of Appeals affirmed the dismissal of the writ.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The Circuit Court of Appeals for the Fifth Circuit has decided an important question of Federal law involving the interpretation of Article I, Section 8, Article I, Section 9, the Fifth Amendment, and the Thirteenth Amendment of the Constitution of the United States and involving the constitutionality of Public Law 779 of the 81st Congress which question has not been, but should be settled by the Supreme Court of the United States.

(1) The discriminatory classification of doctors in Public Law 779 is unreasonable because such classification is entirely unnecessary and thus Public Law 779 violates the Fifth Amendment.

(2) As the doctors are being drafted to care for civilians, Public Law 779 constitutes involuntary servitude.

ARGUMENT.

The accepted rule applied recently in the case of *Bolling* v. *Sharpe* (1954), 347 U. S. 497, is that a law will be deemed unconstitutional if it discriminates against one class as long as that discrimination is not based upon a reasonable legislative classification. The Court of Appeals in effect completely disregarded that rule in that it refused to consider the principal arguments demonstrating the unreasonableness of the Doctor Draft Law. The Court of Appeals held that the fact that the Act was designed not to draft doctors but to coerce them into entering the service, the fact that there was no necessity for the legislation, but that it was designed to create a pool of doctors for future needs, the fact that the doctors were being drafted not to care for military personnel but to care for large groups of civilians and civilian dependents of military personnel, and the fact that there were sufficient doctors in the medical reserve groups to care for any possible emergencies, "relate to the wisdom and policy of the Act with which the courts are not concerned" (Rec. 44). The Court of Appeals thus refused to consider the facts necessary to determine whether the discriminatory classification of doctors was reasonable or unreasonable, whether it was necessary or frivolous, whether it was capricious and arbitrary, or whether it was based upon reasonable legislative judgment.

It appears amply from the Senate and House hearings on the Doctor Draft Act that the only necessity for Public Law 779 arises from the fact that the armed forces are providing medical care for vast groups of civilians. For example, Surgeon General Armstrong testified before the House Committee on Armed Services on April 20, 1953, in connection with H. R. 4495 (page 537):

> "At the moment they (the physicians in service) are taking care of approximately the same number of dependents as they are military."

He also went on to testify (page 539):

> "Overseas, we take care of members of the State Department, various Government missions, Congressmen and their families when they are traveling, and so on and so forth * * *. Wherever we have a medical facility, be it Army, Navy or Air Force, and there are American citizens there who can't get medical care that is comparable to what we are used to, by and large we take care of them."

In addition, the principal question involved in considering whether Public Law 779 violates the Thirteenth Amendment against involuntary servitude is completely overlooked unless the fact that doctors are drafted to care for civilians is considered. The fact that doctors in the armed forces spend at least fifty per cent of their time, and probably more, caring for civilians, raises a serious question whether this is not legislation by which "the personal service of one man is disposed or coerced for another's benefit" which was defined as the essence of involuntary servitude prohibited by the Fourteenth Amendment in the case of *Bailey* v. *State of Alabama,* 219 U. S. 219 at 240.

The Doctor Draft Act, if reasonable and necessary, is an instrument for the public welfare and for the safety of the nation; if unreasonable, arbitrary, and unnecessary, it could well be the pattern for future tyranny. If the Courts will not consider the unreasonableness and thus the unconstitutionality of legislation which clearly discriminates against a particular class of citizens through oppressive draft legislation, what is to prevent future Congresses from suppressing freedom of religion by drafting all ministers of a particular sect; from destroying freedom of the press by drafting all editors of newspapers expressing opposition

to a particular view; from controlling education by drafting all teachers who seek to explore new methods of teaching; from ending political freedom by drafting all members of an unpopular political party; from oppressing particular nationalities or races by drafting their leaders; or from destroying any other constitutional guarantee of freedom in a similar subversive manner?

It is respectfully submitted that these are problems that cannot be dismissed lightly or without careful consideration and that the Supreme Court should grant a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX.

OPINION.

IN THE UNITED STATES COURT OF APPEALS
For the Fifth Circuit.

No. 14804

WILLIAM R. BERTELSEN,
Appellant,

versus

BRIGADIER GENERAL JAMES B. COONEY,
Appellee.

Appeal from the United States District Court for the Western District of Texas.

(May 20, 1954.)

Before STRUM and RIVES, Circuit Judges and DAWKINS, District Judge.

STRUM, Circuit Judge: Appellant, a graduate medical doctor, when 33 years old was drafted into the United States Army in an enlisted status, in which he is now serving. He was offered a commission both before and after induction, but declined.

As petitioner below, he sought, but was refused, discharge by habeas corpus, claiming that Public Law 779(i)(2), 81st Congress, Second Session, 64 Stat. 826, 50 U. S.

C. A. (Appendix) 454(i)(2), under which he was drafted, is invalid.

The Act, now an amendment of the Universal Military Training Act, authorizes the President, subject to certain limitations, to require special registration for military duty of doctors, dentists, "and allied specialist categories," who have not reached the age of 50 years, and to make special calls for the induction of such persons into the armed services. It was through this process that appellant was inducted.

Appellant asserts that the Act is invalid (1) because it is designed, not really to draft doctors, but to coerce them into entering the service by suspending over their heads a legislative sword of Damocles, imposing upon them the choice of either voluntarily entering the service as a commissioned officer or being drafted in an enlisted status; (2) because these doctors are not needed for present use, but to create a "pool" of doctors for possible future needs; (3) because these doctors are not needed to care for military personnel, but are largely used to care for civilian employees and dependents of military personnel; (4) because there are already sufficient doctors and dentists in the Medical Reserve Corps to care for military personnel; (5) because the war powers of Congress are proportionate to the necessity for their exercise, and that they are here exercised in excess of such necessities; (6) because the Act is arbitrarily and oppressively executed, and is based upon an unreasonable classification, thus denying petitioner due process and equal protection under the Fifth Amendment; and finally, (7) that the Act imposes involuntary servitude, contrary to the Thirteenth Amendment.

The foregoing grounds of attack, save only the last three, relate to the wisdom and policy of the Act, with

which the courts are not concerned. In determining the validity of legislation, courts deal only with Congressional power. If Congress possesses the power to pass the Act, then whether the legislation is wise or unwise, fair or unfair, necessary or unnecessary, is for legislative, not judicial determination. *Polish Natl. Alliance* v. *N. L. R. B.*, 322 U. S. 643, 88 L. Ed. 1509; *Day-Brite Lighting, Inc.* v. *State of Missouri,* 342 U. S. 421, 96 L. Ed. 469; *Indianapolis Brewing Co.* v. *Liquor Control Commission,* 21 Fed. Supp. 969, affirmed 305 U. S. 391, 83 L. Ed. 243.

Petitioner concedes, as indeed he must in the light of the adjudicated cases, that under Art. 1, sec. 8, of the Constitution, Congress has the power to raise and support armies, to maintain a Navy, and to draft personnel for service therein. This power exists in peace time as well as in war. The power is plenary. It is not for the judiciary to review the legislative branch on the question of what military strength is necessary for the safety of the Nation, nor how the forces shall be raised, nor of what elements they shall be composed. These matters are confided to Congress and its agencies. *United States ex rel. Goodman* v. *Hearn,* 5 Cir., 153 Fed. 2d 186; *United States* v. *Macintosh,* 283 U. S. 605, 75 L. Ed. 1302; *Falbo* v. *United States,* 320 U. S. 549, 88 L. Ed. 305; *United States* v. *Henderson,* 7 Cir., 180 Fed. 2d 711; *United States* v. *Cornell,* 36 Fed. Supp. 81; *Warren* v. *United States,* 10 Cir., 177 Fed. 2d 596; *Bronemann* v. *United States,* 8 Cir., 138 Fed. 2d 333.

The remaining constitutional barriers asserted by petitioner, and judicially cognizable, are that the Act contravenes the Fifth and Thirteenth Amendments. It has many times been said that the equal protection clause of the Fifth Amendment does not preclude a resort to classification for the purpose of legislation, even though some groups be differently affected from others. Abstract symmetry in legislation is not required to satisfy the re-

quirements of equal protection. Equal protection requires only that the classification be reasonable, not arbitrary, and that it rest upon some logical ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike, reasonable flexibility being necessarily permitted. Every classification of persons or things for regulation by law produces inequality in some degree. The ultimate test of validity is not whether the classification differs, but whether the differences have a reasonable relation to the subject of the legislation. *Bayside Fish Flour Co.* v. *Gentry,* 297 U. S. 422, 80 L. Ed. 772; *Asbury Hospital* v. *Cass County,* 326 U. S. 207, 90 L. Ed. 6; *Kotch* v. *Board etc.,* 330 U. S. 552, 91 L. Ed. 1093.

The Act extends to all doctors and dentists under the age of 50, and to "allied specialist categories," which by the express terms of the Act includes, but is not limited to, veterinarians, optometrists, pharmacists and osteopaths, imposing upon them all alike the obligation of military service when called by the President under the terms of the Act. In our opinion such a classification satisfies the requirement of equal protection under the Fifth Amendment.

Appellant's last contention that the Act amounts to involuntary servitude stands no better than the others. Every person is subject to be called for military duty in the public safety. It is for Congress to say when, who, to what extent, and how they shall be selected. *Warren* v. *United States,* 10 Cir., 177 Fed. 2d 596. There is nothing unique in the obligation to serve. It is quite analogous to, but much more vital, than other obligations to serve in the public interest, such as the requirement imposed in many places upon able-bodied persons to serve a specified number of days each year in labor upon the public highways,

failure being punishable as a crime, which has been held valid.

The Thirteenth Amendment abolished slavery and involuntary servitude, except as a punishment for crime, but it was never intended to limit the war powers of Congress nor its right to exact public service from all when necessary to meet the public need, Congress being the sole judge of the necessity and extent thereof. *Heflin* v. *Sanford*, 5 Cir., 142 Fed. 2d 798. Congress is expressly authorized to declare war and to provide for the common defense. These powers necessarily carry with them the power to say who shall serve in the armed forces, and in what circumstances.

The Act clearly satisfies the requirements of due process. *U. S. ex rel. Goodman* v. *Hearn*, 5 Cir., 153 Fed. 2d 186.

AFFIRMED.

JUDGMENT.

EXTRACT FROM THE MINUTES OF MAY 20, 1954.

No. 14804

WILLIAM R. BERTELSEN,

versus

BRIGADIER GENERAL JAMES B. COONEY.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and

adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, William R. Bertelsen, and the surety on the appeal bond herein, Great American Indemnity Company, New York, N. Y., be condemned, *in solido,* to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

[PUBLIC LAW 779—81ST CONGRESS]

[CHAPTER 939—2D SESSION]

[S. 4029]

AN ACT

To amend the Selective Service Act of 1948, as amended, so as to provide for special registration, classification, and induction of certain medical, dental, and allied specialist categories, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 4 of the Selective Service Act of 1948, as amended, is hereby amended by adding at the end thereof the following subsections:

"(i) (1) Notwithstanding any other provision of this title, except subsections 6 (j) and 6 (o), the President is authorized to require special registration of and, on the basis of requisitions submitted by the Department of Defense and approved by him, to make special calls for male persons qualified in needed—

"(A) medical and allied specialist categories who have not yet reached the age of fifty at the time of registration, and

"(B) dental and allied specialist categories who have not yet reached the age of fifty at the time of registration.

Persons called hereunder shall be liable for induction for not to exceed twenty-one months of service in the Armed Forces. No such person who is a member of a reserve component of the Armed Forces shall, so long as he remains a member thereof, be liable for registration or induction under this subsection, but nothing in this subsection shall be construed to affect the authority of the President under any other provision of law to call to active duty members and units of the reserve components. No person in the medical, dental, and allied specialist categories shall be inducted under the provisions of this subsection after he has attained the fifty-first anniversary of the date of his birth.

"(2) In registering and inducting persons pursuant to paragraph (1) of this subsection, the President shall, to the extent that he considers practicable and desirable, register and induct in the following order of priority:

"First. Those persons who participated as students in the Army specialized training program or similar programs administered by the Navy, and those persons who were deferred from service during World War II for the purpose of pursuing a course of instruction leading to education in one of the categories referred to in clauses (A) and (B) of paragraph (1) of this subsection, who have had less than ninety days of active duty in the Army, the Air Force, the Navy, the Marine Corps, the Coast Guard, or the Public Health Service subsequent to the completion of or release from the program or course of instruction (exclusive of the time spent in postgraduate training).

"Second. Those persons who participated as students in the Army specialized training program or similar programs administered by the Navy, and those persons who were deferred from service during World

War II for the purpose of pursuing a course of instruction leading to education in one of the above categories, who have had ninety days or more but less than twenty-one months of active duty in the Army, the Air Force, the Navy, the Marine Corps, the Coast Guard, or the Public Health Service subsequent to the completion of or release from the program or course of instruction (exclusive of the time spent in postgraduate training).

"Third. Those who did not have active service in the Army, the Air Force, the Navy, the Marine Corps, the Coast Guard, or the Public Health Service subsequent to September 16, 1940.

"Fourth. Those not included in the first and second priority who have had active service in the Army, the Air Force, the Navy, the Marine Corps, the Coast Guard, or the Public Health Service subsequent to September 16, 1940. Inductions of persons in this priority shall be made in accordance with regulations prescribed by the President which may provide for the classification of such persons into groups according to the number of full months of such service which they have had and for the induction of the members of any such group after the induction of the members of any other such group having a lesser number of full months of such service.

In the selection of individuals from among the categories established by subsection (i) for induction, the President is authorized, under such rules and regulations as he may prescribe, to provide for the deferment of any individual whose deferment is found to be equitable and in the national interest, taking into consideration the length of his previous service in the Armed Forces (including the Coast Guard and the Public Health Service) of the United States, the extent of his participation in the Army specialized training program or similar program administered by the Navy, reasons of hardship or dependency, and the maintenance of the national health, safety, or interest.

"(3) It is the sense of the Congress that the President shall provide for the annual deferment from training and service under this title of numbers of optometry students and premedical, preosteopathic, preveterinary, preoptometry and predental students at least equal to the numbers of male optometry, premedical, preosteopathic, preveterinary, preoptometry and predental students in attendance at colleges and universities in the United States at the present levels, as determined by the Director.

"(j) The President shall establish a National Advisory Committee which shall advise the Selective Service System and shall coordinate the work of such State and local volunteer advisory committees as may be established to cooperate with the National Advisory Committee, with respect to the selection of needed medical and dental and allied specialist categories of persons as referred to in subsection (i). The members of the National Adivsory Committee shall be selected from among individuals who are outstanding in medicine, dentistry, and the sciences allied thereto, but except for the professions of medicine and dentistry, it shall not be mandatory that all such fields of endeavor be represented on the committee.

In the performance of their functions, the National Advisory Committee and the State and local volunteer advisory committees shall give appropriate consideration to the respective needs of the Armed Forces and of the civilian population for the services of medical, dental, and allied specialist personnel; and, in determining the medical, dental, and allied specialist personnel available to serve the needs of any community, such committees shall give appropriate consideration to the availability in such community of medical, dental, and allied specialist personnel who have attained the fifty-first anniversary of their birth.

SEC. 2. Notwithstanding the provisions of section 203 of Public Law 351, Eighty-first Congress, commissioned offi-

cers of the reserve components called or ordered to active duty with or without their consent, shall, if otherwise qualified, be entitled to the benefits of section 203 of Public Law 351, Eighty-first Congress.

SEC. 3. Section 202 of the National Security Act of 1947, as amended, is hereby amended by adding at the end thereof the following subsections:

"(g) Under such regulations as he shall prescribe, the Secretary of Defense with the approval of the President is authorized to transfer between the armed services, within the authorized commissioned strength of the respective services, officers holding commissions in the medical services or corps including the reserve components thereof. No officer shall be so transferred without (1) his consent, (2) the consent of the service from which the transfer is to be made, and (3) the consent of the service to which the transfer is to be made.

"(h) Officers transferred hereunder shall be appointed by the President alone to such commissioned grade, permanent and temporary, in the armed service to which transferred and be given such place on the applicable promotion list of such service as he shall determine. Federal service previously rendered by any such officer shall be credited for promotion, seniority, and retirement purposes as if served in the armed service to which transferred according to the provisions of law governing promotion, seniority, and retirement therein. No officer upon a transfer to any service from which previously transferred shall be given a higher grade, or place on the applicable promotion list, than that which he could have attained had he remained continuously in the service to which retransferred.

"(i) Any officer transferred hereunder shall be credited with the unused leave to which he was entitled at the time of transfer."

SEC. 4. Notwithstanding any other provision of law, where any person who served on active duty as a physician or dentist in the Armed Forces (including the Public Health Service) of the United States subsequent to September 16, 1940, thereafter has been, or shall be, recalled to active duty as a physician or dentist in the Armed Forces (including the Public Health Service) of the United States, such person may, under regulations prescribed by the President, be promoted to such grade or rank as may be commensurate with his medical or dental education, experience, and ability.

SEC. 5. No person inducted under the provisions of this Act shall be entitled to the benefits of the provisions of section 203 of Public Law 351, Eighty-first Congress.

SEC. 6. For the purposes of this Act, the term "allied specialist categories" shall include, but not be limited to, veterinarians, optometrists, pharmacists, and osteopaths.

SEC. 7. This Act, except for section 2 and section 5, shall terminate on July 9, 1951.

Approved September 9, 1950.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 291

WILLIAM R. BERTELSEN, PETITIONER

v.

BRIGADIER GENERAL JAMES B. COONEY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 9-13) is reported at 213 F. 2d 275.

JURISDICTION

The judgment of the Court of Appeals was entered on May 20, 1954 (Pet. 13-14). The petition for a writ of certiorari was filed on August 17, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether the Doctor's Draft Act is unconstitutional on its face as an arbitrary discrimination against an occupational class.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8, of the Constitution of the United States, insofar as relied upon, provides:

> The Congress shall have Power To * * * provide for the common Defence * * *
>
> * * * * *
>
> To raise and support Armies, * * *
> To provide and maintain a Navy;
>
> * * * * *
>
> And
>
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Article I, Section 9, insofar as relied upon, provides:

> No Bill of Attainder or ex post facto Law shall be passed.

Amendment V, insofar as relied upon, provides:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

Amendment XIII, Section 1, provides:

> Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 4(i) of the Universal Military Training and Service Act, 64 Stat. 826, as amended by the Act of June 19, 1951, 65 Stat. 80, 50 U.S.C. App. 454(i) and by Public Law 84, 83d Congress, 1st Sess., 67 Stat. 86 (50 U. S. C. App. (Supp. I) 454 (i), commonly known as the Doctor's Draft Act, in pertinent part provides:

> (i) (1) * * * the President is authorized to require special registration of and, on the basis of requisitions submitted by the Department of Defense and approved by him, to make special calls for male persons qualified in needed—
>
> (A) medical and allied specialist categories who have not yet reached the age of fifty at the time of registration, and
>
> (B) dental and allied specialist categories who have not yet reached the age of fifty at the time of registration.
>
> Persons called hereunder shall be liable for induction for not to exceed twenty-four months of service in the Armed Forces. * * *
>
> (2) In registering and inducting persons pursuant to paragraph (1) of this subsection,

the President shall, to the extent that he considers practicable and desirable, register and induct in the following order of priority:

First. Those persons who participated as students in the Army specialized training program or similar programs administered by the Navy, and those persons who were deferred from service during World War II for the purpose of pursuing a course of instruction leading to education in one of the categories referred to in clauses (A) and (B) of paragraph (1) of this subsection, who have had less than ninety days of active duty in the Army, the Air Force, the Navy, the Marine Corps, the Coast Guard, or the Public Health Service (exclusive of the time spent in postgraduate training).

Second. Those persons who participated as students in the Army specialized training program or similar programs administered by the Navy, and those persons who were deferred from service during World War II for the purpose of pursuing a course of instruction leading to education in one of the above categories, who have had ninety days or more but less than seventeen months of active duty in the Army, the Air Force, the Navy, the Marine Corps, the Coast Guard, or the Public Health Service (exclusive of the time spent in postgraduate training).

Third. Those who did not have active service in the Army, the Air Force, the Navy, the Marine Corps, the Coast Guard, or the Public Health Service subsequent to September 16, 1940.

Fourth. Those not included in the first and second priority who have had active service in the Army, the Air Force, the Navy, the Marine Corps, the Coast Guard, or the Public Health Service subsequent to September 16, 1940. * * *

STATEMENT

On July 17, 1953, petitioner filed a petition for writ of habeas corpus in the District Court for the Western District of Texas, challenging the constitutionality of the statute commonly known as the Doctor's Draft Act (50 U. S. C. App. 454(i), *supra,* pp. 3-5), under which he had been inducted into the medical component of the army. Following a hearing, the District Court entered an order denying the petition (R. 33). On appeal, this order was unanimously affirmed (Pet. 13-14).

The evidence adduced at the District Court hearing was undisputed and may be summarized as follows:

Petitioner entered the United States Navy V-12 Specialized Training Program on August 7, 1944, and was sent by the Navy to the University of Illinois College of Medicine where he was given seventeen months training as a medical student

until December 31, 1945, when he resigned and was honorably discharged as an apprentice seaman (R. 10-11, 26). He received his M.D. degree from the same school (R. 10). He obtained a license to practice medicine in Illinois on August 16, 1948 (R. 10-11).

Pursuant to the Doctor's Draft Act he was inducted into the Army on May 28, 1953 (R. 12). Both prior to and after induction the military authorities offered petitioner a commission as a medical officer (R. 16-17, 19-22, 24), which he has on each occasion refused to accept (R. 22-23, 24, 28).

As a private he was thereafter assigned as a student to the Army Medical Field Service School for Medical Officers at Fort Sam Houston, Texas, under the command of respondent (R. 23-24). His course work is in the field of medicine and surgery, particularly as applied to army use (R. 27). Petitioner does not challenge his service assignment or the treatment he is receiving (R. 27-28). His sole contention is that the Doctor's Draft Act under which he is being retained in the service is unconstitutional (R. 12, 28). The District Court (R. 29-33) and the Court of Appeals (Pet. 9-13) held the Act constitutional.

ARGUMENT

Petitioner admits that he comes within the provisions of the Doctor's Draft Act (50 U.S.C. App. 454(i)), and unlike the situation of the petitioner in *Orloff v. Willoughby*, 345 U. S. 83, makes no contention that he was illegally denied a commission or given duties inconsistent with his standing as a

medical doctor. As his sole basis of attack on the legality of his retention in the Army, petitioner contends that the Doctor's Draft Act is unconstitutional in that it discriminates against an occupational class in violation of the due process clause of the Fifth Amendment, and that it subjects him to involuntary servitude.

Petitioner neither challenges the plenary power in Congress to raise armies through a process of selective conscription (cf. *Selective Service Draft Law Cases,* 245 U. S. 366; *Tarble's Case,* 13 Wall. 397), nor the auxiliary power in Congress to say who shall serve in such armies and in what way. *Warren* v. *United States,* 177 F. 2d 596 (C. A. 10), certiorari denied, 338 U. S. 947. He likewise does not dispute that Congress may, according to exigencies and in its discretion, differentiate between the persons it selects and those it exempts. Cf. *In re Summers,* 325 U. S. 561, 572; *Hamilton* v. *Regents,* 293 U. S. 245, 264. Instead he asserts that Congress has, in this particular instance, acted unreasonably, and thus violated the due process clause of the Fifth Amendment, when in September 1950 it singled out doctors and dentists for special legislative treatment. In making this claim, petitioner relies almost entirely on some testimony, given at the congressional hearings held prior to the enactment of the challenged statute, to the effect that the armed forces provide substantial medical care for civilian dependents of servicemen and for certain American citizens overseas. This testimony wholly fails to establish any violation of due process.

Whether the Congress after the outbreak of Korean conflict acted wisely or unwisely in enacting the Doctor's Draft Act is not legitimately in issue. This Court has consistently declined to evaluate independently the need for legislation where Congress has recorded in its reports a rational basis for its particular choice of action. *United States* v. *Carolene Products Co.,* 304 U. S. 144; *Metropolitan Casualty Insurance Co.* v. *Brownell,* 294 U. S. 580, 584; and see *Dennis* v. *United States,* 341 U. S. 494, 525 (opinion of Mr. Justice Frankfurter). That Congress could properly decide that the legislation was needed is indicated by the following language of the Report of the Committee on Armed Services of the House of Representatives (H. Rep. 3015, 81st Cong., 2d Sess., pp. 2-4):

> This Nation is now engaged in a large expansion of its Armed Forces. As a result of this growth, there is an increased need to provide additional professional, technical, scientific, and specialist services in the medical, dental, and allied fields. Voluntary entry of individuals with the required qualifications and training to meet these needs has been small, especially of physicians and dentists. There are two categories of persons suitably qualified and trained whose services can be utilized to fill the needs of the Armed Forces: members of the Reserve components and individuals who have had little or no military service. Most of those in the first category, namely reservists, have already rendered sub-

stantial service in World War II. * * * On the other hand, those in the second category have rendered little or no military service. Included in this latter group are a number of physicians and dentists who received a portion of their medical and dental education at the expense of the Government under what was known as the Army Specialized Training Program, or the Navy V-12 program. Many of these saw no active service in the Armed Forces. Others were deferred from service to pursue their education, and likewise have never served on active duty other than in a training capacity. * * *

* * * * *

* * * Accordingly, the committee has decided that of the two groups mentioned, individuals who have rendered no military service, or whose service was confined to training duty, should be subject to call at this time before reservists who have previously served are called in large numbers without their consent. The committee further feels that of the group having no military service, or who have served only in a training status, those who have received education at Government expense have an additional moral obligation to render service as a result of previous deferment from actual service to obtain their education and training. For that reason, there has been included in the bill four categories of priority of call which are intended

> to establish as equitable a distribution of the responsibility for service among all the affected individuals as is possible under the circumstances.

See also: S. Rep. No. 2449, 81st Cong., 2d Sess.[1] The factual basis of congressional action in this instance is apparent, and "a statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it",[2] *Metropolitan Casualty Insurance Co.* v. *Brownell,* 294 U. S. 580, 584. The justice of giving priority to those doctors who were given all or a great part of their medical education by the services without the necessity of duty assignment—the position of this petitioner—is manifest. Cf. *Orloff* v. *Willoughby,* 345 U. S. 83, 92.

Petitioner alleges that the draft would be unnecessary if the Army did not misuse the services of its doctors (Pet. 5) "to care for large groups of civilians and civilian dependents of military personnel." However, the protection of American

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[1] That the need for service doctors is a continuing one is indicated by the congressional findings at the time of the enactment of Public Law 84, 83d Cong., 1st Sess., which extended the Doctor's Draft Act to July 1, 1955. See: S. Rep. No. 305, 83d Cong., 1st Sess., pp. 3-4; H. Rep. No. 338, 83d Cong., 1st Sess., pp. 4-5.

[2] *A fortiori,* a reasonable statutory discrimination would not be violative of due process. Cf. *Bolling* v. *Sharpe,* 347 U. S. 497, 499. No problem of equal protection is here involved, since the Fifth Amendment does not contain an equal protection clause.

citizens abroad, including care of their physical well-being, could reasonably be found to be a function of national defense and the care of civilian dependents a legitimate aid in building the morale of the armed forces. The issue of whether the Army is utilizing its medical services efficiently and economically, or whether it is assuming superfluous functions, is hardly the subject of judicial inquiry. Cf. *Orloff* v. *Willoughby,* 345 U. S. at 92-94.

Petitioner's final contention (Pet. 6) that the Act imposes involuntary servitude on persons within its coverage of course falls with the contention that it is unreasonably discriminatory. It has long been settled that the exaction by the Government from the citizen of the duty of contributing to the defense of the nation is not involuntary servitude within the meaning of the Thirteenth Amendment. *Selective Service Draft Law Cases,* 245 U. S. 366, 390; *Kramer* v. *United States,* 147 F. 2d 756, 759 (C. A. 6), certiorari denied, 324 U.S. 878.

CONCLUSION

The decision below is clearly correct and there is no conflict between the circuits or with the decisions of this Court. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

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Petitioner,

vs.

BRIGADIER GENERAL JAMES B. COONEY,

Respondent.

PETITION FOR REHEARING OF THE ORDER OF OCTOBER 18, 1954 DENYING THE PETITION FOR WRIT OF CERTIORARI PURSUANT TO RULE 58-2 OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES.

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The substantial grounds available to petitioner not previously presented in his Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit filed herein in the above cause, are as follows:

The lack of necessity for the enactment of the Doctor Draft Act, Public Law 779, 64 Stat. 826, 81st Congress re-enacted June 19, 1951, 65 Stat. 75 at 88, is emphasized by two matters not previously called to the attention of the Supreme Court. First, at the time of induction of Dr. William Bertelsen the organized reserves contained over 15,000 physicians. According to the testimony before the Committee on Armed Services of the House of Repre-

sentatives on April 20, 1953 (Page 549) as of April 1st, 1953 there were 15,682 physicians in the organized reserves. According to the testimony before the Senate Committee on Armed Services on May 20, 1953 (Page 66), the total number of doctors serving in the Army, Navy and Air Force at approximately that time was 13,422 divided as follows: Army 5,858; Navy 4,226; Air Force 338. Thus the number of doctors in the organized reserves not only was sufficient to meet any immediate emergency, but in fact actually exceeded by more than 2,000 the total number of doctors in the Army, Navy and Air Force. These reservists may be ordered to active duty at any time for any period during an emergency. See 10 U. S. C. 506d(d) and the order of C. E. Wilson, Secretary of Defense August 19, 1953, 18 Fed. Reg. 5106.

In addition, if an emergency existed so that the Armed Services needed additional physicians either to care for dependents and other civilians or to care for military personnel, ample statutory authority exists for the employment of such physicians on a contract basis. 10 U. S. C. 107 provides:

> "*Appointment of contract surgeons.* In emergencies the Surgeon General of the Army, with the approval of the Secretary of War, may appoint as many contract surgeons as may be necessary. (Feb. 2, 1901, Ch. 192, #18, 31 Stat. 752)."

Appropriate provision is made for pay and allowances of contract physicians, 37 U. S. C. 101.

During World War II, the President by Proclamations of September 8, 1939 (4 F. R. 3851) and May 27, 1941 (6 F. R. 2617) declared a national emergency which authorized the appointment of contract surgeons under 10 U. S. C. 107 by the Surgeon General of the Army. During World War II no special law drafting doctors was passed to fill the medical requirements of the armed services.

Congress by Joint Resolution of July 25, 1947, Ch. 327, #3, 61 Stat. 449, provided that July 25, 1947 shall be the termination of the state of war and of national emergency proclaimed by the President September 8, 1939 and May 27, 1941 authorizing the appointment of contract surgeons in emergencies under 10 U. S. C. 107. The language of the Joint Resolution is as follows:

"Joint resolution.

"To terminate certain emergency and war powers.

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled.*

* * * * *

"Sec. 3. In the interpretation of the following statutory provisions, the date when the joint resolution becomes effective shall be deemed to be the date of the termination of any state of war heretofore declared by the Congress and of the national emergencies proclaimed by the President on September 8, 1939, and on May 27, 1941;

* * * * *

"The fourth provision of Section 18 of the Act of February 2, 1901 (31 Stat. 748, Ch. 192);"

This fourth provision of Section 18 of the Act of February 2, 1901 as amended is 10 U. S. C. 107, authorizing the employment of contract surgeons, quoted above. No new joint resolution has been passed or executive order proclaimed declaring a new emergency to authorize the employment of contract physicians. If the emergency is not serious enough to authorize the employment of contract physicians, how can it be serious enough by any conceivable consideration to justify the discriminatory draft of doctors?

In this same connection it should be noted that the amendment to the Doctor Draft Law effective July 1,

1953 (Public Law 84, 83rd Congress, Section 3) expressly provides:

> "* * * That except in time of war or national emergency hereafter declared by the Congress, any person who is discharged or who resigns his commission under the provisions of this subsection shall not thereafter be subject to induction under the provisions of subsection 4 (i) of the Universal Military Training and Service Act (64 Stat. 826), as amended."

Thus Congress in recognizing that an emergency may exist in the future, also recognizes that no emergency exists at present.

It is respectfully submitted that these facts emphasize the lack of necessity for this discriminatory draft law aimed at a single occupational group. When these facts are coupled with the fact that the drafted doctors have civilians as at least one-half of their patients, as pointed out in the original petition for writ of certiorari, it is submitted that the lack of necessity for the legislation is so apparent that the classification of doctors as a special group subject to discriminatory draft legislation constitutes a clear violation of the due process clause.

It is respectfully suggested that these matters compel a reconsideration of the denial of the petition for writ of certiorari and the granting of the writ.

Respectfully submitted,

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CERTIFICATE.

IRWIN J. ASKOW, hereby certifies that he is counsel for William R. Bertelsen, petitioner herein; that the above Petition for Rehearing is presented in good faith and not for delay and said Petition is restricted to the grounds specified in Rule 58.2.

IRWIN J. ASKOW.